

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

# UNITED STATES OF AMERICA

Plaintiff,  
VS.

ERIC TYRONE JACKSON,

Defendant.

Case No.: 2:11-cr-00442-GMN-GWF

## ORDER

ERIC TYRONE JACKSON,

## Defendant

Pending before the Court is Defendant Eric Tyrone Jackson’s (“Defendant’s”) Motion for Impassionate Release (“MCR”), (ECF No. 408), and Amended Motion for Impassionate Release (“AMCR”), (ECF No. 411). The Government filed a Response to the AMCR, (ECF No. 418), to which Defendant filed a Reply, (ECF No. 426).

Also pending before the Court is Defendant's Motion to Produce Medical Records, (ECF No. 404); Defendant's Motion for Appointment of Counsel, (ECF No. 410); Defendant's Motion to Seal Exhibit Two to the AMCR, (ECF No. 413); the Government's Motion for Leave to File Sealed Exhibit, (ECF No. 419); Defendant's Motion to Attach Recent Filings, (ECF No. 421); Defendant's Motion to Extend Time, (ECF No. 427); Defendant's Motion for Leave to File a Sur-Reply, (ECF No. 430); and Defendant's Motion to Dismiss Counsel, (ECF No. 432).<sup>1</sup>

For the reasons discussed below, the Court **DENIES** Defendant's MCR and AMCR. Further, the Court **GRANTS** Defendant's Motion to Attach Recent Filings. The Court also **GRANTS *nunc pro tunc*** Defendant's Motion for Appointment of Counsel, Defendant's Motion to Seal Exhibit Two to Defendant's AMCR, Defendant's Motion to Extend Time, the

<sup>1</sup> Defendant additionally filed two supplements to his Reply to the AMCR. (See First Supplement, ECF No. 431); (see also Second Supplement, (ECF No. 433).

1 Government's Motion for Leave to File Sealed Exhibit, and the Government's Motion for  
2 Leave to File a Sur-Reply. Finally, the Court **DENIES as moot** Defendant's Motion to  
3 Produce Medical Records and Defendant's Motion to Dismiss Counsel.

4 **I. BACKGROUND**

5 On November 5, 2012, Defendant pleaded guilty to two counts of the Superseding  
6 Indictment: (1) Count Three: Armed Bank Robbery in violation of 18 U.S.C. § 2113(a) and (d);  
7 and (2) Count Four: Possession of a Firearm in Furtherance of a Crime of Violence in violation  
8 of 18 U.S.C. § 924(c)(1)(A)(ii). (*See* Mins. Proceedings, ECF No. 68); (Superseding  
9 Indictment, ECF No. 45). The Court sentenced Defendant to 20-months custody, as to Count  
10 Three; and 84-months custody, as to Count Four, to be served consecutively. (*See* Mins.  
11 Proceedings, ECF No. 98); (J., ECF No. 100). Defendant is presently in custody at Federal  
12 Correctional Institution, Otisville ("FCI Otisville"). (*See* AMCR 2:19–20, ECF No. 411).

13 On September 13, 2021, Defendant filed an MCR, requesting early release given his  
14 asthma, chronic lung disorder, and vitamin D deficiency. (*See generally* MCR, ECF No. 408).  
15 He later filed an AMCR with the assistance of counsel. (*See generally* AMCR). The Court  
16 addresses Defendant's Motion for Compassionate Release and Amended Motion for  
17 Compassionate Release below.

18 **II. LEGAL STANDARD**

19 The compassionate release provision of 18 U.S.C. § 3582(c)(1)(A), as amended by the  
20 First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (Dec. 21, 2018), authorizes the sentencing  
21 court to modify a term of imprisonment in limited circumstances, upon a motion by the  
22 defendant. 18 U.S.C. § 3582(c)(1)(A). The sentencing court may order compassionate release,  
23 "if after considering the factors set forth in 18 U.S.C. § 3553(a)," the defendant has  
24 demonstrated: (1) he has exhausted his administrative remedies; and (2) "extraordinary and  
25 compelling reasons" warrant a reduction in her sentence. *Id.* The Court must also consider

1 whether a reduction in sentence is consistent with applicable policy statements issued by the  
2 United States Sentencing Commission. *Id.* While there is currently no applicable policy  
3 statement for § 3582(c)(1)(A) motions filed by a defendant, “[t]he Sentencing Commission’s  
4 statements in U.S.S.G § 1B1.13,” which apply to § 3582(c)(1)(A) motions filed by the Bureau  
5 of Prisons (“BOP”), “may inform a district court’s discretion for § 3582(c)(1)(A) motions filed  
6 by a defendant, but they are not binding.” *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir.  
7 2021).

8 **III. DISCUSSION**

9 Defendant raises two principal arguments in support of his AMCR. First, Defendant  
10 asserts that the spread of COVID-19 at FCI Otisville, along with his underlying chronic lung  
11 disorder provide “extraordinary and compelling reasons” for his early release from custody.  
12 (AMCR 9:3–14:12). Second, Defendant argues that serving his sentence at FCI Otisville  
13 violates the Eighth Amendment because the facility’s inability to protect him from COVID-19  
14 amounts to cruel and unusual punishment. (*Id.* 16:15–18:14). The Court addresses each  
15 argument in turn.

16 **A. Sentence Reduction under 18 U.S.C. § 3582**

17 As a preliminary matter, the parties do not dispute that Defendant properly exhausted his  
18 administrative remedies. (AMCR 5:12–19); (Resp. to AMCR 1:18, ECF No. 418). The Court  
19 will thus limit its discussion to an analysis of whether Defendant has presented extraordinary  
20 and compelling reasons for release.

21 Defendant maintains that the COVID-19 pandemic presents extraordinary and  
22 compelling reasons for his release because of his “asthma/lung disorder diagnosis.” (AMCR  
23 14:6–8). In response, the Government argues Defendant is unable to provide extraordinary and  
24 compelling reasons for early release because he is vaccinated. (Resp. to AMCR 7:14–18).  
25 Defendant also avers, however, in the alternative: if the Court does not order early release and a

1 reduction in sentence, the Court should allow him to serve a portion of his remaining sentence  
2 under home confinement. (AMCR 14:13–16:14).

3 Extraordinary and compelling reasons for compassionate release may exist when a  
4 defendant demonstrates he is suffering from a severe medical condition. *See U.S.S.G. §*  
5 1B1.13. When considering “extraordinary and compelling reasons” for release based on a  
6 medical condition in light of the COVID-19 pandemic, courts have looked to the safety of the  
7 defendant’s current detention institution compared to release, as well as whether the  
8 defendant’s medical conditions elevate the risk of severe illness from COVID-19. *See, e.g.,*  
9 *United States v. Kauwe*, 467 F. Supp. 3d 940, 2020 WL 2926460, at \*2 (D. Nev. 2020); *United*  
10 *States v. Walters*, No. 2:16-CR-00011-JAD-PAL, 2020 WL 3104049, at \*2 (D. Nev. June 11,  
11 2020); *United States v. Delgado*, No. 3:18-CR-17-(VAB)-1, 457 F. Supp. 3d 85, 2020 WL  
12 2464685, at \*6 (D. Conn. Apr. 30, 2020).

13 Given the efficacy of COVID-19 vaccines, courts have routinely denied compassionate  
14 release, in part, because a defendant is vaccinated. *United States v. Thompson*, No. 2:16-cr-  
15 00230-GMN-DJA-1, 2021 WL 2324498, at \*2 (D. Nev. June 7, 2021); *see also United States v.*  
16 *Young*, No. 3:08-cr-00120-LRH-VPC, 2021 WL 4899159, at \*2 (D. Nev. Oct. 20, 2021)  
17 (finding extraordinary and compelling reasons do not exist for compassionate release because  
18 of COVID-19 vaccine efficacy). Courts have similarly denied compassionate release in cases  
19 where a defendant lives with chronic medical conditions, including asthma. *See United States v.*  
20 *Grummer*, 519 F. Supp. 3d 760, 761, 763 (S.D. Cal. 2021) (“Although Defendant suffers from  
21 [chronic heart disease, hypertension, and asthma,] his vaccination significantly mitigates the  
22 risk that he will contract COVID-19.”); *United States v. Boice*, No. 3:18-cr-00028-LRH-WGC,  
23 2021 WL 2270668, at \*2 (D. Nev. June 3, 2021) (denying compassionate release because being  
24 vaccinated against COVID-19 mitigated the risk of becoming severely ill from the coronavirus  
25

1 disease despite suffering from hypertension, BMI, high blood pressure, and chronic kidney  
 2 disease).<sup>2</sup>

3 Here, Defendant fails to demonstrate that his chronic health conditions constitute  
 4 extraordinary and compelling reasons because he is inoculated against COVID-19. (MCR at 1);  
 5 (AMCR 14:6–8). Defendant received his Johnson and Johnson (“J&J”) vaccination on June 15,  
 6 2021. (Sealed BOP Immunizations, Ex. 1 to Resp. to AMCR, ECF No. 420). The Centers for  
 7 Disease Control and Prevention have advised that the J&J vaccine effectively protects  
 8 individuals against serious health outcomes from the coronavirus. *Johnson & Johnson’s*  
 9 *Janssen COVID-19 Vaccine Overview and Safety* (Oct. 29, 2021),  
 10 <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/janssen.html>.  
 11 Defendant, thus, fails to demonstrate extraordinary and compelling reasons warranting early  
 12 release.

13 Further, evidence before the Court belies Defendant’s assertion that the prevalence of  
 14 COVID-19 at FCI Otisville further supports early release. (*See* AMCR 9:3–13:12). Defendant  
 15 asserts the prevalence of COVID-19 and the BOP’s failure to take basic precautions present  
 16 additional extraordinary and compelling reasons for early release. (*Id.* 10:5–11:8). However, as

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 18 <sup>2</sup> Defendant also argues in his Second Supplement to his Reply (“Second Supplement”) that extraordinary and  
 19 compelling reasons for release exist because (1) the J&J vaccine has a lower efficacy rate than the Pfizer and  
 20 Moderna vaccines, (2) the CDC recommends that individuals like Defendant receive an early booster shot, and  
 21 (3) he may not receive his booster shot within six months of receiving his original dose. (Second Suppl. 3:1–18,  
 22 ECF No. 433). Defendant, however, provides scant authority to support his assertions. First, according to the  
 23 CDC, all approved COVID-19 vaccines decrease the severity of illness in people who contract the coronavirus  
 24 disease. *When You’ve Been Fully Vaccinated* (Oct. 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html>. Second, the BOP announced that it would offer booster shots to most  
 25 immunosuppressed inmates at least 28 days after being fully vaccinated. *See* FEDERAL BUREAU OF PRISONS,  
 COVID-19 VACCINE GUIDANCE 5–6 (14.1st ed. 2021),  
[https://www.bop.gov/resources/pdfs/covid\\_19\\_vaccine\\_guidance\\_v14\\_0\\_2021.pdf](https://www.bop.gov/resources/pdfs/covid_19_vaccine_guidance_v14_0_2021.pdf) (“The BOP will offer the  
 Pfizer-BioNTech COVID-19 booster vaccine to all inmates (minus those who already received a 3rd dose given  
 their immunosuppressed state.”); *United States v. Rand*, No. 3:16-cr-00029-MMD-WGC-1, 2021 WL 4394782,  
 at \*1 (D. Nev. Sep. 24, 2021) (stating in passing that COVID-19 vaccines were available in a BOP facility as  
 early as December 30, 2020). This suggests the BOP will be able to continue providing the necessary care to  
 protect inmates against COVID-19. As such, the Court finds the claims in his Second Supplement do not show  
 extraordinary and compelling reasons for release.

1 of November 12, 2021, FCI Otisville reported one confirmed COVID-19 case and zero deaths.  
 2 See COVID-19 Coronavirus, <https://www.bop.gov/coronavirus/index.jsp> (last visited Nov. 12,  
 3 2021).<sup>3</sup> Defendant's medical records additionally show FCI Otisville has provided him with  
 4 necessary care, including medically assessing him on September 1, 2021, ordering multiple  
 5 mometasone furoate inhaler doses and an albuterol inhaler to treat his asthma, and  
 6 cholecalciferol to treat his vitamin D deficiency. (See MCR at 14 of 30), (Sealed Med. R. at 27,  
 7 Ex. 2 to AMCR, ECF No. 412); (MCR at 4 of 30). Taken together, the evidence does not  
 8 support Defendant's argument.

9 Finally, the Court denies Defendant's alternative request for transfer to home  
 10 confinement. Defendant specifically requests that the Court allow him to serve the remaining  
 11 portion of his sentence in home confinement because of the COVID-19 pandemic. (AMCR  
 12 2:14–18). The Court may make a placement recommendation to the BOP, but it is within the  
 13 BOP's discretion to follow the recommendation. See 18 U.S.C. § 3621(b) (delegating authority  
 14 to the BOP to choose a defendant's place of imprisonment after considering the sentencing  
 15 court's location of confinement recommendation); *United States v. Ceballos*, 671 F.3d 852, 855  
 16 (9th Cir. 2011) (*per curiam*). Here, the Court declines to recommend home confinement  
 17 because Defendant's health has not severely deteriorated nor is he severely vulnerable to  
 18 COVID-19 because of his J&J vaccine. Cf. *United States v. Williams*, No. 2:14-cr-00321-  
 19 GMN-NJK-3, 2021 WL 149832, at \*2–4 (D. Nev. Jan. 14, 2021) (recommending home  
 20 confinement because the defendant suffered from asthma, heart disease, obesity, hypertension,  
 21 hyperthyroidism, and diabetes); *United States v. Prince*, No. 2:16-cr-00225-GMN-NJK-2, 2020

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 23 <sup>3</sup> Defendant notified the Court that he will be transferring from FCI Otisville in the future and requested the  
 24 Court to consider the new facility's COVID-19 case rates. (See generally Notice Regarding Upcoming Prison  
 25 Transfer, ECF No. 434). However, Defendant does not specify the location of his next transfer. (See *id.*). As  
 such, the Court cannot compare positive COVID-19 rates between FCI Otisville and Defendant's next facility, or  
 any interim facility.

WL 7714704, at \*2 (D. Nev. Dec. 28, 2020), *appeal dismissed*, No. 21-10009, 2021 WL 2835487 (9th Cir. Apr. 15, 2021) (recommending home confinement because the defendant became confined to a wheelchair, suffered from severe cataracts, was partially oxygen dependent, and endured three strokes resulting in temporary paralysis of his left side, difficulty speaking, and mental fogging). Defendant has neither shown that his physical condition has severely deteriorated nor that he is severely vulnerable to the coronavirus disease despite being inoculated against it.<sup>4</sup> Accordingly, the Court denies compassionate release and home confinement.<sup>5</sup>

#### **B. Eighth Amendment Prohibition of Cruel and Unusual Punishment**

Defendant additionally argues that serving his sentence at FCI Otisville violates the Eighth Amendment because the facility is unable to adequately protect him from contracting COVID-19. (AMCR 18:10–14). Specifically, Defendant analogizes the current COVID-19 pandemic to the environmental threats in *Helling v. McKinney*, 509 U.S. 25 (1993)—a case in which the Supreme Court held that exposure to environmental threats could constitute an Eighth Amendment violation. (*Id.* 16:15–18:14).

In general, “petitions that challenge the manner, location, or conditions of a sentence’s execution must be brought pursuant to § 2241 in the custodial court.” *Hernandez v. Campbell*, 204 F.3d 861, 864–65 (9th Cir. 2000). Though compassionate release motions are properly raised in the sentencing court, habeas petitions under 28 U.S.C. § 2241 must be brought in the

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<sup>4</sup> Defendant also argues for early release, or alternatively home confinement, because FCI Otisville cannot provide necessary medical care for his health conditions. (*See* AMCR 2:24–3:4). However, as stated above, FCI Otisville recently assessed him and have provided Defendant with various treatments for his asthma and vitamin D deficiency. (*See* Sealed Med. Records at 14, Ex. 6 to MCR), (Sealed Med. Records at 27, Ex. 2 to AMCR, ECF No. 412); (Sealed Med. Records at 4, Ex. 1 to MCR). As such, the Court finds Defendant’s argument unpersuasive.

<sup>5</sup> Given that the Court does not find any extraordinary and compelling reasons for early release, the Court does not consider the remaining 18 U.S.C. § 3553(a) sentencing factors. *See* 18 U.S.C. § 3582(c)(1)(A).

1 district court where the defendant is confined. *See id.* at 865; *see also United States v. Tafoya-*  
 2 *Ramos*, No. 1:15-cr-0288-AWI-SKO-6, 2020 WL 7425341, at \*5 (E.D. Cal. Dec. 18, 2020).

3 Here, the Court cannot consider Defendant's Eighth Amendment violation claim  
 4 because the Court does not have jurisdiction over it. Defendant's Eighth Amendment claim—  
 5 namely, FCI Otisville's inability to protect Defendant from COVID-19—relates to the manner  
 6 and conditions of confinement, which is more appropriately brought as a habeas petition under  
 7 18 U.S.C. § 2241. *See Tafoya-Ramos*, 2020 WL 7425341, at \*4 (interpreting a defendant's  
 8 Eighth Amendment violation claim to justify compassionate release as a habeas petition under  
 9 § 2241). Broadly construing Defendant's Eighth Amendment claim as a habeas petition under  
 10 § 2241, the Court cannot hear this claim because it is not the court of confinement. (*See* AMCR  
 11 2:9, 2:19–20) (indicating that Defendant resides in FCI Otisville, located in Otisville, New  
 12 York). To the extent that Defendant intends to seek release under § 2241, he must do so in the  
 13 United States District Court for the Southern District of New York, the district in which FCI  
 14 Otisville is located. Defendant's Amended Motion for Compassionate Release is accordingly  
 15 denied.

16 **IV. CONCLUSION**

17 **IT IS HEREBY ORDERED** that Defendant's Motion for Compassionate Release,  
 18 (ECF No. 408), is **DENIED**.

19 **IT IS FURTHER ORDERED** that Defendant's Amended Motion for Compassionate  
 20 Release, (ECF No. 411), is **DENIED**.

21 **IT IS HEREBY ORDERED** that Defendant's Motion to Produce Medical Records,  
 22 (ECF No. 404), is **DENIED as moot**.<sup>6</sup>

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 25 <sup>6</sup> Given that the Court has obtained copies of Defendant's medical records, the Court denies as moot Defendant's Motion to Produce Medical Records.

1           **IT IS FURTHER ORDERED** that Defendant's Motion for Appointment of Counsel,  
2 (ECF No. 410), is **GRANTED *nunc pro tunc*.** IT IS FURTHER ORDERED that Defendant's  
3 Motion to Seal Exhibit Two to Defendant's Amended Motion for Compassionate Release,  
4 (ECF No. 413), is **GRANTED *nunc pro tunc*.**<sup>7</sup>

5           **IT IS FURTHER ORDERED** that the Government's Motion for Leave to File Sealed  
6 Exhibit, (ECF No. 419), is **GRANTED *nunc pro tunc*.**<sup>8</sup>

7           **IT IS FURTHER ORDERED** that Defendant's Motion to Attach Recent Filings, (ECF  
8 No. 421), is **GRANTED.**<sup>9</sup>

9           **IT IS FURTHER ORDERED** that Defendant's Motion to Extend Time, (ECF No.  
10 427), is **GRANTED *nunc pro tunc*.**

11           **IT IS FURTHER ORDERED** that the Government's Motion for Leave to File a Sur-  
12 Reply, (ECF No. 430), is **GRANTED *nunc pro tunc*.**<sup>10</sup>

17           <sup>7</sup> The Exhibit contains Defendant's confidential medical records. Accordingly, the Court finds good cause to  
18 seal the record. *See, e.g., Johnson v. Tambe*, No. 19-141-TSZ-MLP, 2019 WL 4014256, at \*2 (W.D. Wash. Aug.  
19 26, 2019) (finding the plaintiff's "privacy interest in his own medical records to be a sufficiently compelling  
reason to seal the medical records themselves").

20           <sup>8</sup> This Exhibit also contains Defendant's confidential medical records. Thus, the Court finds good cause to seal  
21 the record.

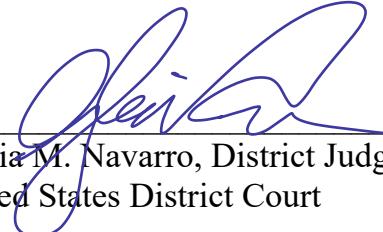
22           <sup>9</sup> Defendant requests the Court to attach his recent filings to the AMCR. (*See* Mot. to Attach Recent Filings,  
23 (ECF No. 421). The Court has considered all the motions and underlying documentation in its above analysis.

24           <sup>10</sup> The Government seeks leave to file a Sur-Reply to address Defendant's new argument in his Reply that the  
25 Government has taken inconsistent positions regarding vaccinations. For good cause appearing, the Court grants  
the Government's Motion for Leave to File a Sur-Reply. *See Allen v. Campbell*, No. 4:20-CV-00218-DCN, 2020  
WL 6876198, at \*7 (D. Idaho Nov. 23, 2020) (explaining that this Court may grant a motion to file a Sur-Reply  
"where a valid reason for such additional briefing exists, such as the movant rais[ing] new arguments in its reply  
brief." (internal quotations omitted)).

1           **IT IS FURTHER ORDERED** that Defendant's Motion to Dismiss Counsel, (ECF No.  
2 432), is **DENIED as moot.**<sup>11</sup>

3           **DATED** this 16 day of November, 2021.

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Gloria M. Navarro, District Judge  
United States District Court

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25           <sup>11</sup> Defendant seeks to dismiss Ms. Lisa Rasmussen as his appointed counsel because of alleged lack of communication between himself and Ms. Rasmussen. (*See* Mot. Dismiss Counsel at 1, ECF No. 432). Given that the Court has not yet appointed Ms. Rasmussen as counsel, there is no counsel to dismiss at this stage of the proceedings. Accordingly, the Court denies as moot Defendant's Motion to Dismiss Counsel.